STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD PUCCINI,

Petitioner,

vs. Case No. 18-4738

SOJOURN HOSPITALITY-NAPLES BAY RESORT,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before Andrew D. Manko, Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),[1/] on January 14, 2019, by video teleconference between sites in Tallahassee and Fort Myers, Florida.

APPEARANCES

For Petitioner: (by telephone)
Richard Puccini, pro se
Apartment 19
2030 Monroe Avenue
Naples, Florida 34109

For Respondent:
Jason L. Gunter, Esquire
Gunter Firm
Suite 101
1514 Broadway
Fort Myers, Florida 33901

STATEMENT OF THE ISSUE

Whether Respondent, Sojourn Hospitality-Naples Bay Resort, discriminated and retaliated against Petitioner, Richard Puccini, on the basis of his sex, in violation of section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

On December 6, 2017, Petitioner, a massage therapist, filed a complaint with the Florida Commission on Human Relations ("FCHR") asserting that Respondent, a resort and spa, discriminated against him on the basis of his sex and then retaliated by eliminating some of his work duties and ultimately terminating him. Specifically, Petitioner alleged that his supervisor, a female massage therapist, committed sex-based discrimination by asking customers whether they preferred a female or male therapist and scheduling appointments with female therapists on a preferential basis, even when the customer gave no gender preference, both of which decreased the number of his appointments. Petitioner also alleged that his supervisor removed him from any responsibility to schedule appointments when he initially complained and thereafter terminated him when he protested that his supervisor booked an appointment with herself, even when the customer requested a male therapist.

In response to the complaint, Respondent asserted that spa standards required it to ask customers whether they preferred a

female or male therapist, that full time therapists (unlike Petitioner, who was hired on an as-needed basis) were given appointment precedence when customers failed to offer a gender preference, and that Petitioner was terminated because he allegedly yelled at a coworker and used profanity.

On August 8, 2018, FCHR notified Petitioner of its determination that no reasonable cause existed to believe that Respondent engaged in an unlawful employment practice. On September 11, 2018, Petitioner timely filed a Petition for Relief with FCHR and requested an administrative hearing on his complaint for a discriminatory employment practice. On that same day, FCHR referred this matter to DOAH and requested assignment of an Administrative Law Judge to conduct a formal evidentiary hearing.

The undersigned initially scheduled the final hearing for October 26, 2018. On October 19, 2018, the undersigned held a pre-hearing teleconference, at which Petitioner requested an unobjected-to continuance to conduct additional discovery and confirm the availability of his witnesses. On October 25, 2018, the undersigned issued an Order granting the continuance and rescheduling the final hearing for January 14, 2019, at 9:30 a.m., to be heard by video teleconference at sites in Tallahassee and Fort Myers, Florida. The Order notified the parties of the date, time, and location of the final hearing and

other pertinent procedures. The Order was served on all parties and mailed to Petitioner's address of record with DOAH. In advance of the hearing, Petitioner and Respondent both filed their proposed exhibits.

At the final hearing, Respondent's counsel and witnesses appeared in person in Fort Myers. Petitioner did not appear at 9:30 a.m., the scheduled start time for the hearing. However, after the undersigned's office called Petitioner to inquire as to his whereabouts, he appeared by telephone. Petitioner indicated that he wished to proceed solely on his proposed exhibits and did not plan to present the testimony of any witnesses.[2/]

Accordingly, Petitioner's Exhibits 1 and 2 were admitted into evidence without objection. Respondent introduced no exhibits into evidence. No witness testimony was presented.

No transcript of the proceedings was filed at DOAH. Though the parties were given ten days to file their respective proposed recommended orders, no such proposed orders were filed.

FINDINGS OF FACT

1. The record is comprised solely of Petitioner's Exhibits 1 and 2, which constitute inadmissible hearsay for which no exception to the hearsay rule has been established.[3/] Because no testimony or other admissible evidence exists, as to which such hearsay could be used to explain or otherwise supplement, there can be no findings of fact.

CONCLUSIONS OF LAW

2. DOAH has jurisdiction over the subject matter and parties to this proceeding pursuant to sections 120.569 and 120.57(1).

3. Petitioner must prove that Respondent discriminated and retaliated against him on the basis of his sex by a preponderance of the evidence. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009); § 120.57(1)(j), Fla. Stat. A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 (Fla. 2014).

4. Under the Florida Civil Rights Act of 1992 ("FCRA"), sections 760.01-.11, Florida Statutes, an "employer" shall not discriminate against an individual because of that individual's sex. § 760.10(1)(a), Fla. Stat.

5. It is also unlawful for an "employer" to engage in retaliation, such as "discriminat[ing] against any person because that person has opposed any practice which is an unlawful employment practice under this section." § 760.10(7), Fla. Stat.

6. The FCRA defines "employer" as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." § 760.02(7), Fla. Stat.

7. Lacking any record evidence as to the number of individuals employed by Respondent, Petitioner failed to establish that Respondent is an "employer" under the FCRA.

8. Even assuming Respondent is an "employer," Petitioner failed to establish that he was discriminated or retaliated against on the basis of his sex.

9. Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended, "the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

10. "It is well-settled law that Florida courts follow the three-part framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), and its progeny, for establishing, by circumstantial evidence, a discrimination claim based on disparate treatment in the workplace." Valenzuela, 18 So. 3d at 21-22.

11. Under the McDonnell Douglas framework, Petitioner has the initial burden of establishing a prima facie case of sex-based discrimination. To establish a prima facie case, Petitioner must demonstrate by a preponderance of the evidence that: 1) he is a member of a protected class; 2) he was qualified for the position; 3) he was subjected to an adverse employment action; and 4) his employer treated similarly-situated employees outside of his

protected class more favorably than he was treated. Valenzuela, 18 So. 3d at 22; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006).

12. Because the record is devoid of any evidence on which factual findings surrounding Petitioner's employment properly could be made, Petitioner failed to prove his claim of sex-based employment discrimination.

13. As to Petitioner's retaliation claim, he must establish a prima facie case and demonstrate by a preponderance of the evidence that: (1) he was engaged in statutorily protected expression or conduct; (2) he suffered an adverse employment action; and (3) there is a causal relationship between the two events. Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997).

14. Because the record is devoid of any evidence on which factual findings surrounding Petitioner's termination properly could be made, Petitioner failed to prove his retaliation claim.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order in this proceeding finding that the Petitioner failed to establish that Respondent discriminated against him on the basis of his sex or retaliating against him and dismissing the Petition in its entirety.

DONE AND ENTERED this 29th day of January, 2019, in Tallahassee, Leon County, Florida.

ANDREW D. MANKO
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2019.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2018), unless otherwise noted.

[2/] Petitioner confirmed that he wished to proceed without presenting any testimony at the hearing. However, to the extent his comments could be deemed a request for a continuance, the undersigned denied that request as untimely and because good cause had not been shown. Indeed, though the hearing had been duly noticed for several months, Petitioner decided not to appear in person—without notifying the undersigned or Respondent in advance—and only appeared by telephone after the undersigned's office contacted him when he failed to show up at the location. Respondent also would be unduly prejudiced if its counsel and witnesses were required to travel again to Fort Myers for another hearing date.

[3/] The record evidence is limited to Petitioner's Exhibits 1 and 2. Petitioner's Exhibit 1 is comprised of: portions of FCHR's investigative file, including its investigative memorandum; Petitioner's Petition for Relief; FCHR's no-cause determination and notice thereof; Petitioner's formal complaint and rebuttal letters; notes of FCHR's investigator; several comment forms from Petitioner's clients; two apparent screen

shots of Respondent's schedule for October 19, 2016, and October 21, 2017; an apparent screen shot of a purported text message exchange between Petitioner and his supervisor at the resort, Cathy Ceballos; a form nominating Petitioner as a "star" at work completed by Ms. Ceballos in July 2016; and an e-mail review from a client about Petitioner's services, dated June 7, 2016. Petitioner's Exhibit 2 is an e-mail, dated January 8, 2019, from Jorge Ramirez to Petitioner concerning Mr. Ramirez's interview at the resort.

These exhibits were admitted in evidence without objection, but the documents themselves and most of the information contained therein (the majority of Petitioner's Exhibit 1 and the entirety of Petitioner's Exhibit 2) constitute hearsay. Hearsay is admissible in administrative proceedings, but can only be used to explain or supplement other admissible evidence; a finding of fact cannot be based on hearsay alone unless that evidence would be admissible in a civil action over objection. § 120.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.213(3). Petitioner presented no evidence as to the facts surrounding the alleged discrimination or retaliation other than what is contained in these two hearsay exhibits; Petitioner also presented no evidence to establish the predicate necessary to admit the exhibits or the information therein under a hearsay exception. See Wark v. Home Shopping Club, 715 So. 2d 323, 324 (Fla. 2d DCA 1998) (holding that hearsay documents could not be used to support a finding of fact where no other supporting evidence had been admitted and the proponent of the hearsay failed to establish the predicate necessary to admit the evidence under the business records exception); Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 808-09 (Fla. 1st DCA 1986) (same).

Accordingly, these two exhibits—the only evidence in the record—cannot be used to make findings of fact.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.